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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

GULF OIL CORPORATION,
Petitioner,
v.
FEDERAL ENERGY REGULATORY COMMISSION, *et al.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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REPLY TO BRIEFS AND MEMORANDA IN OPPOSITION TO THE PETITION

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INDEX

	Page
ARGUMENT	2
I. The Decision Below As To A Conflict Between The Natural Gas Act And The Federal Arbitration Act With Regard To An Arbitration Provision In A Certificated Contract Should Be Resolved By This Court	2
II. The Conflict With Decisions Of This Court As To Commission Power To Order "Reparations" Or "Refunds" And The Conflict Between The Circuits In The Construction Of Section 16 Of The Natural Gas Act Should Be Resolved By This Court	6
III. Use Of "Swing Provisions" In Producers' Contracts Presents Questions Of Importance That Should Be Resolved	9
CONCLUSION	10

TABLE OF CITATIONS

CASES:

Carey v. *Westinghouse Electric Corporation*, 375 U.S. 261 (1964)	2, 3, 4, 5
Cobb v. *Lewis*, 488 F.2d 41 (5th Cir. 1974)	5
Federal Power Commission v. *Hope Natural Gas Company*, 320 U.S. 591 (1944)	3, 7
Federal Power Commission v. *Sunray DX Oil Company*, 391 U.S. 9 (1968)	7
Federal Power Commission v. *Texaco Inc.*, 417 U.S. 380 (1974)	8
Mesa Petroleum Company v. *Federal Power Commission*, 441 F.2d 182 (5th Cir. 1971)	7
Mobil Oil Corporation v. *Federal Power Commission*, 483 F.2d 1238 (D.C. Cir. 1973)	8
Murphy Oil Corporation v. *Federal Power Commission*, 431 F.2d 805 (8th Cir. 1970)	8

TABLE OF CITATIONS—Continued

CASES:	Page
O'Meara v. *Texas Gas Transmission Corporation*, 230 F.Supp. 788 (N.D. Ill. 1964)	5
Retail Clerks Local 588 v. *National Labor Relations Board*, —— F.2d —— (D.C. Cir. No. 76-1722, November 4, 1977)	3
Scherk v. *Alberto-Culver Company*, 417 U.S. 506 (1974)	3
Shell Oil Company v. *Federal Power Commission*, 292 F.2d 149 (3d Cir.), cert. denied, 368 U.S. 915 (1961)	5
Sunray Mid-Continent Oil Company v. *Federal Power Commission*, 364 U.S. 137 (1960)	2
United Gas Improvement Company v. *Callery Properties*, 382 U.S. 223 (1965)	7
United Gas Pipeline Company v. *Mobile Gas Service Corporation*, 350 U.S. 332 (1956)	2
United Steelworkers of America v. *American Manufacturing Company*, 363 U.S. 564 (1960)	4
Wilko v. *Swan*, 346 U.S. 427 (1953)	3, 5

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REPLY TO BRIEFS AND MEMORANDA IN OPPOSITION TO THE PETITION

Petitioner Gulf Oil Corporation (Gulf) hereby replies to briefs and memoranda opposing the Petition filed on behalf of the Federal Energy Regulatory Commission (Commission), Public Service Electric and Gas Company (Public Service), Texas Eastern Transmission Corporation (Texas Eastern), and the Public Service Commission of the State of New York (New York).

ARGUMENT

I. The Decision Below As To A Conflict Between The Natural Gas Act And The Federal Arbitration Act With Regard To An Arbitration Provision In A Certificated Contract Should Be Resolved By This Court

The Commission asserts (Br., pp. 7-8) that because it has the responsibility under the Act to "insure compliance with certificates of public convenience and necessity," arbitration would have no "controlling effect" on the Commission, and it "would serve mainly the purpose of delay." These contentions by the Commission and its supporters do not deal with the basic issue which should be resolved by this Court—whether there is such a conflict between *arbitration* under the Federal Arbitration Act and *enforcement* of a certificated contract under the Natural Gas Act that the arbitration provision in the contract is a nullity. (See Petition, pp. 12-20).

Nowhere does the Commission address itself to this question.[1] The extent to which the Commission would be bound by a decision of the arbiters is not relevant to the question of whether otherwise arbitrable issues should be submitted to arbitration. *Carey* v. *Westinghouse Corporation*, 375 U.S. 261, 271-272 (1964) (cited by the Commission, p. 9, n. 6), held that even where authority of the National Labor Relations Board to override the arbiters' decision is expressly provided for in the National Labor Relations Act, arbitration should, nevertheless, proceed:

> "*Thus the weight of the arbitration award is likely to be considerable*, if the Board is later required to rule on phases of the same dispute. * * * Should the Board disagree with the arbiter, by ruling, for example, that the employees involved in the controversy are members of one bargaining unit or another, the Board's ruling, would, of course, take precedence; * * *. *Yet * * * the possibility of conflict is no barrier to resort to a tribunal other than the board.*" (Emphasis supplied)

[1] The Commission's distinction of *United Gas Pipeline Company* v. *Mobile Gas Service Corporation*, 350 U.S. 332 (1956), on the ground that this Court in *Sunray Mid-Continent Oil Company* v. *Federal Power Commission*, 364 U.S. 137 (1960), recognized that where there is a conflict between the Natural Gas Act and a provision in the contract the Act prevails misses the point. *The question here is whether such a conflict exists.*

See also, *Retail Clerks Local 588* v. *National Labor Relations Board*, —— F.2d —— (D.C. Cir. No. 76-1722, November 4, 1977). Unlike the situation in *Carey* involving the National Labor Relations Act, there is no need for the Court to determine here, where the Natural Gas Act is silent, what effect the Commission should give the arbiters' decision. (See discussion in Gulf's Petition at page 20.)

The decisions in *Carey* and *Wilko* v. *Swan*, 346 U.S. 427, 438 (1953), highlight the desirability of reconciling the purposes of both Acts before one is set aside for the other.[2] The policy of the Natural Gas Act, as expressed by this Court,[3] to protect natural gas consumers is easily reconciled with the policy of the Federal Arbitration Act to encourage arbitration of contract disputes, particularly where, as here, the arbitration was provided for in the contract submitted for approval to the Commission and approved by it.

[2] See also *Scherk* v. *Alberto-Culver Company*, 417 U.S. 506 (1974), where the Court's analysis of the Securities Act of 1933 and the Securities and Exchange Act of 1934 laid great stress on the fact that the provisions of the 1933 Act construed in *Wilko* v. *Swan*, *supra*, guaranteed a court forum for determination of the controversy while the 1934 Act provided an individual cause of action only by implication. There are no provisions in the Natural Gas Act which on their face or by necessary implication preclude arbitration of contract disputes.

[3] *Federal Power Commission* v. *Hope Natural Gas Company*, 320 U.S. 591 (1944).

Contentions (New York Br., p. 3; Texas Eastern Br., p. 3) that the "public interest" requires that the Commission decide disputes between the parties as to interpretation of certificated contracts,[4] rather than first permitting them to be submitted to arbiters, fail to distinguish between the public interest in *enforcement* of a certificated contract and its *initial interpretation.* Interpretation and enforcement are different functions. Arbitration involves only the first. As has been said, once the contract issues have been passed on by the arbiters, the Commission can determine what enforcement, if any, is required. *Carey* v. *Westinghouse Corporation, supra.* No procedure for enforcement of the "delivery obligation" would be impaired by arbitration, as the Commission suggests (Br., p. 9, n. 5).

Furthermore, discussion (Texas Eastern Br., p. 3) of the merits of the arbitration issues begs the question.[5] In *United Steelworkers of America* v. *American Manufacturing Company*, 363 U.S. 564, 568 (1960), this Court said, "The Courts therefore, have *no business weighing the merits* of the grievances * * *. The agreement is to submit *all grievances to arbitration not merely those which the court will term meritorious.*" (Emphasis supplied.) The same must be said of a regulatory commission with regard to contract disputes submitted to arbitration by a procedure it had approved.

[4] The Commission's preoccupation (Br., pp. 7-8) with the supposed merger of the contract with the certificate obscures rather than enlightens the problem. As the Court of Appeals pointed out, there is "little substance" to the certificate as such, because its scope is largely "defined by the terms of the contract" (Appendix A, p. 8a).

[5] Contrary to the view of the Commission (Br., p. 11, n. 8), the substantive issues submitted to arbitration are encompassed by the questions presented in the Petition and will remain for resolution after the threshold question of arbitrability is resolved. Before the Commission and the court below, Gulf showed that the record in this case is incomplete for resolution of the arbitration issues on the merits (see Petition, pp. 10, 18).

The Commission points out (Br., p. 9) that the cases cited by Gulf (Pet., pp. 16-17) did not involve a certificated contract under a regulatory statute. This is true of *all* cases cited by *all* parties. There is no case on that precise point. However, the cases cited by Gulf (Pet., pp. 16-17) enunciate and apply Congressional policy favoring arbitration in numerous situations. The Commission cites no arbitration cases other than *Carey* v. *Westinghouse Corporation, supra.* Cases cited by New York (Br., p. 3) and Texas Eastern (Br., p. 4), such as *Wilko* v. *Swan, supra,* and *Cobb* v. *Lewis,* 488 F.2d 41 (5th Cir. 1974) involving the Securities Act of 1933, antitrust and other statutes, held that Congressional policy *expressed in those statutes* invalidated the arbitration provisions involved. Such decisions are inapposite to the question of whether an irreconcilable conflict exists *here* between the initial construction of a contract by arbiters under the Arbitration Act and ultimate enforcement of the certificate by the Commission under the Natural Gas Act. As Gulf has shown, there is no reason why the purposes of both Acts cannot be effectuated by adherence to the initial procedure for settling disputes in the manner certificated by the Commission, leaving the scope of its enforcement duties to be determined upon receipt of the arbiters' decision.

The effect of the decision below is to invalidate arbitration provisions generally in certificated contracts on the sole ground of an assumed conflict with the Commission's enforcement powers. That conflict does not exist. Arbitration provisions are common in gas contracts. For the first time here, the Commission has assailed their application, although they have been involved in other Commission proceedings.[6] It does little good to say that the

[6] *Shell Oil Company* v. *Federal Power Commission,* 292 F.2d 149 (3d Cir.), cert. den. 368 U.S. 915 (1961); see also *O'Meara* v. *Texas Gas Transmission Corporation,* 230 F.Supp. 788 (N.D. Ill. 1964).

arbitration provision can be salvaged to settle "private" contract disputes between the parties. The disputes here are the kind of contract disputes most likely to occur. Furthermore, the arbitration provision, to the Commission's knowledge when it issued the certificate, covered *all* disputes under the contract.

If the decision below is allowed to stand, arbitration provisions in hundreds, if not thousands, of gas contracts will be nullified. This is a matter of substantial importance in the administration of the Natural Gas Act and in recognition of the right of natural gas companies to rely on provisions in their contracts which are neither prohibited by the Act nor nullified by conditions in the certificates issued by the Commission.

II. The Conflict With Decisions Of This Court As To Commission Power To Order "Reparations" Or "Refunds" And The Conflict Between The Circuits In The Construction Of Section 16 Of The Natural Gas Act Should Be Resolved By This Court

The Court of Appeals, the Commission, and other parties concede that the "refund" order in this case is unprecedented (*e.g.*, Appendix A, pp. 28a-32a) and describe the "remedy" as "novel" (*e.g.*, Commission Br., p. 9). Gulf has shown that the holding below as to Commission power to issue such an order conflicts with this Court's constructions of Sections 4 and 7 of the Natural Gas Act (Pet., pp. 21-23); results in a conflict in the Circuits in construction of Section 16 of that Act (Pet., pp. 24-25); and presents a question of Commission authority which is of increasing importance during a natural gas shortage as claims for "damages" and "compensation" mount (Pet., pp. 25-26).

None of the opponents to the Petition presents persuasive reasons why this Court should not review and resolve these questions expeditiously. None attempts to

reconcile the holding below with limitations on Commission powers to order "reparations" or "refunds" recognized in *Federal Power Commission* v. *Hope Natural Gas Company*, 320 U.S. 591 (1944); *United Gas Improvement Company* v. *Callery Properties*, 382 U.S. 223 (1965); and *Federal Power Commission* v. *Sunray DX Oil Company*, 391 U.S. 9 (1968).[7] None can erase the express recognition by the court below of the conflict with construction of Section 16 of the Act by the Court of Appeals for the District of Columbia Circuit;[8] and none can refute general applicability of the construction below of Section 16 to all sales of natural gas subject to Commission jurisdiction.[9]

In essence, the opponents argue that factual circumstances in this case warranted the drastic "remedy" chosen by the agency, and that a desired result can justify a conclusion that agency authority to fashion such a "remedy" is virtually unlimited (see New York Br., pp. 4-6; Public Service Br., p. 2; Commission Br., p. 10). The arguments, however, ignore reality. The facts are that the "refund" order is in direct conflict with the "filed rate" under Section 4 of the Act; that the Commission has *no* power to order refunds under Section 7(c) after issuance, as here, of an *un*conditioned permanent certificate under Section 7(c); and that both the Commission and the court below necessarily recognized that there had been *no* "abandonment" by Gulf to which Section 7(b) of the Act could apply (Appendix A, pp. 31a-37a). The facts in this case simply are not the same circumstances presented under Section 7(b) of the Act in *Mesa Petroleum Company* v. *Federal Power Commission*,

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[7] See discussion in the Petition at pp. 21-23.

[8] See statements by the court at Appendix A, pp. 31a-37a, and discussion in the Petition at pp. 24-25.

[9] See Petition, pp. 25-26, and cases cited at p. 26, n. 20.

441 F.2d 182 (5th Cir. 1971), the principal case relied upon by the opponents and the court below.

Section 16 of the Act, as construed by the District of Columbia Circuit,[10] the Eighth Circuit,[11] and this Court,[12] also cannot provide elastic, substantive authority for a "reparations" or "refund" order, as the opponents argue. Those courts and this Court have warned against expansive reading of Section 16 which, in the last analysis, is the purported substantive basis for the "refund" order in this case. Contrary to the arguments here (New York Br., p. 5, n. 4), the court below correctly saw "irreconcilable" conflict in construction of Section 16 by the circuits (Appendix A, p. 37a). That conflict can be resolved only by this Court.

Further, whether a contract contains "warranty" language or not is irrelevant to the questions of "refund" power presented in this case. The holding as to Sections 7(c) and 16 is that upon a finding of delivery deficiency under Section 7(c), the Commission then can proceed beyond ordering compliance with Section 7(c) and can issue "refund" and monetary payment orders under Section 16. The holding therefore is applicable to *any* certificate issued under Section 7(c), and the expansive substantive construction of Section 16 is in derogation of any "filed rate" heretofore binding and controlling monetary payments under Section 4. The "unprecedented," "novel" remedy fashioned in this case thus does present questions of general applicability under the Act which cannot be minimized, particularly during a shortage of natural gas.

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[10] *Mobil Oil Corporation* v. *Federal Power Commission*, 483 F.2d 1238 (D.C. Cir. 1973).

[11] *Murphy Oil Corporation* v. *Federal Power Commission*, 431 F.2d 805 (8th Cir. 1970).

[12] *Federal Power Commission* v. *Texaco Inc.*, 417 U.S. 380 (1974).

III. Use Of "Swing Provisions" In Producers' Contracts Presents Questions Of Importance That Should Be Resolved

As on other issues, opponents argue that "warranty" language in the Gulf contract minimizes the importance of the holding below which converts a "swing" provision into a continuous daily delivery obligation (New York Br., pp. 6-7; Public Service Br., pp. 2-3; Commission Br., pp. 10-11). The issue cannot be so limited because of widespread industry use of such provisions and the customary equation of the maximum quantity with cold-weather "peaking" demands (see Petition, pp. 27-29). Quite correctly, the court below was troubled by the Commission construction and apparently affirmed on this issue with reluctance (see Appendix A, pp. 9a-11a).

Strangely, the Commission now purports not to understand what is meant by "peaking" (see Commission Br., p. 11, n. 8). Yet, in 1963, in granting certificates to Gulf and Texas Eastern the Commission made findings as to Texas Eastern's intent to use the Gulf supply to take higher quantities on "peak" days (I App. 54-68); the 1963 Staff Memorandum analyzed this contract in terms of the "swing provision" (see Petition, p. 11, n. 10); and throughout the 1960s and early 1970s, the Commission had considered such provisions in its own rulemaking proceedings (see Petition, p. 27, n. 21).

These statements in the Commission's Brief underscore the errors of the Commission in this case in construing a "swing" provision, and the necessity for correction of an error that can affect conclusions as to daily delivery obligations under thousands of contracts.

CONCLUSION

For the foregoing reasons and those set forth in the Petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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